No. 13,659

IN THE

United States Court of Appeals

For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC., a corporation,

Appellant,

vs.

GEORGE DOPPLMAIER,

Appellee.

Reply Brief for Appellant

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FILED
MAY 11 1953
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CLERK

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TABLE OF AUTHORITIES CITED

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The present reply will be limited to the principal question of Appellant's right to intervene in this action as a matter of right.

The subsidiary question as to the survival of jurisdiction, as pointed out in the conclusion of the Brief for Appellant (p. 13), depends upon the discretion of this Court, and since the Court is not required to decide it, it will not be further discussed herein.

The Brief for Appellee cites the appearance of the same attorney for both Stout Irrigation, Inc. and Farmland Irrigation Company, Inc. as evidence that Farmland Irrigation Company, Inc. is *represented* in the present action, citing *McAvoy v. United States,* 178 Fed.(2d) 353 (C.A. 4; 1949) in support of this contention. In that case it appears that a bankruptcy court denied leave to apply for intervention by the United States in a pending Federal District Court suit for the reason, *inter alia,* that the interest of the United States was represented by its Justice Department acting as attorney for a party to the record in the pending suit. Obviously, the Justice Department of the United Staes is incapable of acting in the interest of any party but the United States. It has but one client. If it *appears* in the record of a case acting as attorney for a party, it is still *representing* its one client, the United States.

On the contrary, any lawyer not in the employ of the United States may simultaneously *appear* in behalf of a plurality of parties so long as their interests are not in conflict. However, his *appearance* in behalf of a plurality of parties in the same suit is no basis whatever for concluding that the interest of one party in behalf of whom he appears is *represented* at all by the other party. His *appearance* for both means nothing more than that the interests of the parties whom he separately *represents* are not in conflict.

That this distinction between "appearance" and "representation" is not "a distinction without a difference" will be evident from a consideration of the counterclaim contained in the proposed pleading of Farmland Irrigation Company, Inc. filed with its Motion to Intervene as a Defendant in this

action and appearing in the Record at pages 22 to 25, inclusive. This counterclaim presents a justiciable controversy, based upon the assertion of Farmland Irrigation Company, Inc. that it is the successor of Stout Irrigation, Inc., which was not and could not have been placed in issue on the original Complaint and Answer. It is for the purpose of securing adjudication of this issue that Farmland Irrigation Company, Inc. seeks to intervene here, since it could not have secured adjudication of that issue even by openly and avowedly controlling the defense of Stout Irrigation, Inc. in the original action.

Its right to intervene for that purpose is further supported by the case of *Deauville Associates, Inc. v. Eristavi-Tchitcherine*, 173 Fed.(2d) 745 (C.A. 5; 1949) cited in the Brief for Appellant (p. 7), and none of the cases cited in the Brief for Appellee (involving situations in which beneficiaries of a trust sought to intervene in an action to which the trustee representing them was a party) are in any way relevant to this situation.

Additionally, however, the Court's attention is invited to the case of *Innis, Speiden & Company et al. v. Food Machinery Corporation; Brogdex Company of California, Ltd., intervenor*, 2 F.R.D. 261; 53 U.S.P.Q. 330, in which Circuit Judge Biggs, sitting as a District Judge, upheld the right of a territorial exclusive licensee under a patent to intervene in an infringement action instituted by the patent owner, holding that the interest of the territorial exclusive licensee was inadequately represented by the patent owner solely because the acts of infringement relied upon by the plaintiff had occurred prior to the acquisition by the intervenor of the exclusive license in question.

This case is submitted as constituting additional authority for the proposition that a successor to even a portion of the right of a party cannot be considered adequately represented by its predecessor in interest.

It is submitted, therefore, that Appellant's right to intervene in this case as a matter of right has been in no way impugned by any authority cited in the Brief for Appellee, and that the order of the District Court denying Appellant's Motion to Intervene should be reversed.

Dated May 11, 1953.

Respectfully submitted,

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